

* The original of this document contains information which is subject to withholding from disclosure under 5 U.S.C. 552. Such material has been deleted from this copy and replaced with XXXXXX's.

April 25, 2005

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Appeal

Name of Case: Worker Appeal

Date of Filing: September 21, 2004

Case No.: TIA-0212

XXXXXXXXXX (the Applicant) applied to the Department of Energy (DOE) Office of Worker Advocacy (OWA) for assistance in filing for state workers' compensation benefits. The Applicant was a DOE contractor employee at a DOE facility. An independent physician panel (the Physician Panel or the Panel) found that the Applicant did not have an illness related to a toxic exposure at DOE. The OWA accepted the Panel's determination, and the Applicant filed an appeal with the DOE's Office of Hearings and Appeals (OHA). As explained below, we have concluded that the appeal should be granted.

I. Background

A. The Energy Employees Occupational Illness Compensation Program Act

The Energy Employees Occupational Illness Compensation Program Act of 2000 as amended (the Act) concerns workers involved in various ways with the nation's atomic weapons program. See 42 U.S.C. §§ 7384, 7385. As originally enacted, the Act provided for two programs. Subpart B provided for a Department of Labor (DOL) program providing federal compensation for certain illnesses. See 20 C.F.R. Part 30. Subpart D provided for a DOE assistance program for DOE contractor employees filing for state workers' compensation benefits. Under the DOE program, an independent physician panel assessed whether a claimed illness or death arose out of and in the course of the worker's employment, and exposure to a toxic substance, at a DOE facility. 42 U.S.C. § 7385o(d)(3); 10 C.F.R. Part 852 (the Physician Panel Rule). The OWA was responsible for this program.

The Physician Panel Rule provided for an appeal process. An applicant could appeal a decision by the OWA not to submit an application to a Physician Panel, a negative determination by a Physician Panel that was accepted by the OWA, and a final decision by the OWA not to accept a Physician Panel determination in favor of an applicant. The instant

appeal was filed pursuant to that Section. The Applicant sought review of a negative determination by a Physician Panel that was accepted by the OWA. 10 C.F.R. § 852.18(a)(2).

While the Applicant's appeal was pending, Congress repealed Subpart D. Ronald W. Reagan Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375 (October 28, 2004). Congress added a new subpart to the Act, Subpart E, which establishes a DOL workers' compensation program for DOE contractor employees. Under Subpart E, all Subpart D claims will be considered as Subpart E claims. *Id.* § 3681(g). In addition, under Subpart E, an applicant is deemed to have an illness related to a workplace toxic exposure at DOE if the applicant received a positive determination under Subpart B. *Id.* § 3675(a).

During the transition period, in which DOL sets up the Subpart E program, OHA continues to process appeals of negative OWA determinations.

B. Procedural Background

The Applicant was employed as a machinist at DOE's Oak Ridge site (the site). The Applicant filed an application with OWA, requesting physician panel review of three illnesses - colon cancer, skin cancer, and prostate cancer.

The Physician Panel rendered a negative determination on the claimed illnesses. For the claimed colon cancer, the Panel stated that without a completed National Institute for Occupational Safety and Health (NIOSH) dose reconstruction report, it was difficult to assess the probability that the Applicant's radiation exposure was a factor in the illness. However, the Panel considered the relatively high occurrence of colon cancer in the general population, the Applicant's smoking history, the epidemiologic data that did not indicate that workers at the site were at a higher risk for colon cancer, and the moderate levels of measured radiation exposure. Based on this information, the Panel determined that it was "less likely than not that potential hazardous exposures at [the site] were a significant contributor" to the Applicant's colon cancer. Panel Report at 1. For the claimed skin cancer, the Panel stated that the Applicant's dispensary records and sick slips from treating physicians throughout the course of his employment at the site do not make any reference to skin cancer. The Panel further stated that the only indication that the Applicant had skin cancers removed is a section of a hospital summary under the heading of "past surgical history." The Panel determined that given the lack of information in the record regarding this illness, there was "little reason to conclude that the [Applicant's] DOE work exposures significantly contributed to this undocumented condition." Panel Report at 3. For the claimed prostate cancer, the Panel stated that there was no conclusive diagnosis of prostate cancer for the Applicant.

The OWA accepted the Physician Panel's determination. The Applicant filed the instant appeal.

The Applicant provided several arguments on appeal. First, the Applicant argued that he did not recall saying that he wanted his claim to move forward prior to completion of the NIOSH report. Second, the Applicant argued that he had multiple skin cancers on his face. He stated that he was unable to obtain medical records regarding the condition because his treating physician is deceased. Third, the Applicant argues that records regarding his prostate cancer should have been included in the record.

II. Analysis

Under the Physician Panel Rule, independent physicians rendered an opinion whether a claimed illness was related to a toxic exposure during employment at DOE. The Rule required that the Panel address each claimed illness, make a finding whether that illness was related to a toxic exposure at DOE, and state the basis for that finding. 10 C.F.R. § 852.12. The Rule required that the Panel's determination be based on "whether it is at least as likely as not that exposure to a toxic substance" at DOE "was a significant factor in aggravating, contributing to, or causing the illness." *Id.* § 852.8.

The Applicant's first argument on appeal - that he did not recall stating that the claim should proceed without the completed NIOSH dose reconstruction report - is not a basis for finding panel error. The case history indicates that the Applicant gave permission for his claim to proceed to panel review without the NIOSH report. Record at 17. If the Applicant receives a NIOSH dose reconstruction that he believes supports his claim, he should raise the matter with DOL in connection with his Subpart E claim.

The Applicant's argument that he had skin cancer does not indicate Panel error. The Panel recognized the reference to skin cancer in the Applicant's records but found that the lack of any documentation precluded a determination that the cancers were related to toxic exposures at DOE. The Applicant may wish to have his personal physician examine the sites of the surgery and provide a supporting letter. If the Applicant obtains any further information, he should contact DOL on how to proceed.

We agree with the Applicant that the Panel erred when it stated that the record did not contain evidence of a positive diagnosis of prostate cancer. The record contains a letter from the Applicant's treating physician indicating that the Applicant had the illness. Record at 24. The case history also indicates that the Applicant underwent prostate surgery. *Id.* at 17. We note that, in conjunction

with his appeal, the Applicant provided several documents indicating a positive diagnosis of prostate cancer and the treatment he underwent for the illness. Those documents should be considered in the Applicant's Subpart E claim.

As the foregoing indicates, the Panel incorrectly stated that the record contained no evidence of prostate cancer. Accordingly, this application should be given further consideration.

In compliance with Subpart E, the claim will be transferred to the DOL for review. The DOL is in the process of developing procedures for evaluating and issuing decisions on these claims. OHA's grant of this claim does not purport to dispose of the DOL's review of the claim under Subpart E.

IT IS THEREFORE ORDERED THAT:

- (1) The Appeal filed in Worker Advocacy Case No. TIA-0212 be, and hereby is, granted as set forth in paragraph 2 below.
- (2) The Physician's Panel report incorrectly concluded that the record did not contain evidence of prostate cancer. Reconsideration is in order.
- (3) This is a final order of the Department of Energy.

George B. Breznay
Director
Office of Hearings and Appeals

Date: April 25, 2005